U.S. Department of Labor

Office of Administrative Law Judges
36 E. 7th St., Suite 2525
Cincinnati, Ohio 45202

(513) 684-3252
(513) 684-6108 (FAX)

Issue Date: 27 February 2007

Case No. 2006-BLA-5136

In the Matter of:
C.S., OBO V.S.[1]
Claimant,

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS.[2]

APPEARANCES:
Larry D. Wines, Esq.
On behalf of Claimant

Patrick L. DePace, Esq.
On behalf of Director

BEFORE: Thomas F. Phalen, Jr.
Administrative Law Judge

DECISION AND ORDER – DENIAL OF BENEFITS

[1] Effective August 1, 1006, the Department of Labor directed the Office of Administrative Law Judges, the Benefits Review Board, and the Employee Compensation Appeals Board to cease use of the name of the claimant and claimant family members in any document appearing on a Department of Labor web site and to insert initials of such claimant/parties in the place of those proper names. In support of this policy change, DOL has adopted a rule change to 20 C.F.R. Section 725.477, eliminating a requirement that the names of the parties be included in decisions. Further, to avoid unwanted publicity of those claimants on the web, the Department has installed software that prevents entry of the claimant's full name on final decisions and related orders. This change contravenes the plain language of 5 U.S.C. 552(a)(2) (which requires the internet publication), where it states that "in ***each case*** the justification for the deletion [of identification] shall be explained fully in writing." (*emphasis added*). The language of this statute clearly prohibits a "catch all" requirement from the OALJ that identities be withheld. Even if §725.477(b) gives leeway for the OALJ to no longer publish the names of Claimants – 5 U.S.C. 552(a)(2) clearly requires that the deletion of names be made on a case by case basis.

I also strongly object to this policy change for reasons stated by several United States Courts of Appeal prohibiting such anonymous designations in discrimination legal actions, such as *Doe v. Frank,* 951 F. 2d 320 (11th Cir. 1992) and those collected at 27 Fed. Proc., L. Ed. Section 62:102 (Thomson/West July 2005). This change in policy rebukes the long standing legal requirement that a party's name be anonymous only in "*exceptional cases*." *See Doe v. Stegall*, 653 F.2d 180, 185 (5th Cir. 1981), *James v. Jacobson*, 6 F.3d 233, 238 (4th Cir. 1993), *and Frank* 951 F.2d at 323 (noting that party anonymity should be rarely granted)(*emphasis added*). As the Eleventh Circuited noted, "[t]he ultimate test for permitting a plaintiff to proceed anonymously is whether the plaintiff has a substantial privacy right which outweighs the customary and constitutionally-embedded presumption of openness in judicial proceedings." *Frank*, 951 F.2d at 323.

This is a decision and order arising out of a claim for benefits under Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended by the Black Lung Benefits Act of 1977, 30 U.S.C. §§ 901-962, ("the Act") and the regulations thereunder, located in Title 20 of the Code of Federal Regulations. Regulation section numbers mentioned in this Decision and Order refer to sections of that Title.[3]

On October 31, 2005, this case was referred to the Office of Administrative Law Judges by the Director, Office of Workers' Compensation Programs, for a hearing. (DX 37).[4] A formal hearing on this matter was conducted on November 16, 2006 in Athens, Ohio by the undersigned Administrative Law Judge. All parties were afforded the opportunity to call and to examine and cross examine witnesses, and to present evidence, as provided in the Act and the above referenced regulations.

ISSUES

The issues in this case are:

1. Whether the Claimant has established the existence of pneumoconiosis;

2. Whether the Claimant's pneumoconiosis arose out of coal mine employment;

3. Whether the Claimant is totally disabled;

4. Whether the Claimant's disability is due to pneumoconiosis; and

5. Whether the Claimant has demonstrated that one of the applicable conditions of entitlement has changed since the date of the last denial pursuant to § 725.309(d).

(DX 37; Tr. 7). The issue of timeliness was withdrawn at the hearing. (Tr. 7).

Finally, I strongly object to the specific direction by the DOL that Administrative Law Judges have a "mind-set" to use the complainant/parties' initials if the document will appear on the DOL's website, for the reason, *inter alia,* that this is not a mere procedural change, but is a "substantive" procedural change, reflecting centuries of judicial policy development regarding the designation of those determined to be proper parties in legal proceedings. Such determinations are nowhere better acknowledged than in the judge's decision and order stating the names of those parties, whether the final order appears on any web site or not. Most importantly, I find that directing Administrative Law Judges to develop such an initial "mind-set" constitutes an unwarranted interference in the judicial discretion proclaimed in 20 C.F. R. § 725.455(b), not merely that presently contained in 20 C.F.R. § 725.477 to state such party names.

[2] Island Creek Coal Company (self insured through Consol Energy, Inc. c/o Acordia Employers Service) was dismissed as a responsible operator on September 25, 2006. (ALJX 2).

[3] The Department of Labor amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 65 Fed. Reg. 80, 045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725 and 726). On August 9, 2001, the United States District Court for the District of Columbia issued a Memorandum and Order upholding the validity of the new regulations. All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[4] In this Decision, "DX" refers to the Director's Exhibits, "CX" refers to the Claimant's Exhibits, "ALJX" refers to Administrative Law Judge Exhibits, and "Tr." refers to the official transcript of this proceeding.

Based upon a thorough analysis of the entire record in this case, with due consideration accorded to the arguments of the parties, applicable statutory provisions, regulations, and relevant case law, I hereby make the following:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Background

V.S. ("Claimant") was born on July 30, 1938, and died at the age of sixty-six on March 28, 2005. (DX 4, 33). He completed the eighth grade. (Tr. 12). He married on December 28, 1957, and his widow was his only dependent. (DX 9; Tr. 11).

Claimant's widow testified that in the last few years of her husband's life, he was coughing and spitting up a lot. (Tr. 10). He had also suffered a stroke and was not able to do much. He lacked quality of life and could hardly walk. (Tr. 14). He took Albuterol and was on oxygen. (Tr. 13). His primary physician was Dr. Evans. (Tr. 15). At his deposition, the miner testified that he also had Alzheimer's disease. (DX 22).

Procedural History

Claimant filed his initial claim for benefits under the Act on April 25, 1983, and that claim was denied by a Department of Labor claims examiner on August 12, 1983. (DX 1). Claimant took no further action until he filed a second claim on August 9, 1987. (DX 2). It was denied by a claims examiner on April 5, 1988 for failure to establish any elements of entitlement. (DX 2).

On August 4, 2003, Claimant filed a subsequent claim for benefits under the Act. (DX 4). The Director, Office of Worker's Compensation Programs ("OWCP"), issued a Proposed Decision and Order Denial of Benefits on November 1, 2004. (DX 27). The Claimant timely requested a formal hearing before the Office of Administrative Law Judges. (DX 29).

Length of Coal Mine Employment

The determination of length of coal mine employment must begin with § 725.101(a)(32)(ii), which directs an adjudication officer to ascertain the beginning and ending dates of coal mine employment by using any credible evidence. There are several permissible sources of credible evidence. First, an administrative law judge may rely solely upon a coal mine employment history form completed by the miner. *See Harkey v. Alabama-By-Products Corp.*, 7 B.L.R. 1-26 (1984). A miner's uncontradicted and credible testimony may also be the exclusive basis for a finding on the length of miner's coal mine employment. *See Bizarri v. Consolidation Coal Co.*, 7 B.L.R. 1-343 (1984); *Coval v. Pike Coal Co.*, 7 B.L.R. 1-272 (1984). If the miner's testimony is unreliable, it is permissible for an administrative law judge to credit Social Security records over the miner's testimony. *See Tackett v. Director, OWCP*, 6 B.L.R. 1-839 (1984).

The miner's widow testified that he worked as a miner for about twenty years. He worked underground, at the tipple, and at the end of his career, as a truck driver. (Tr. 12-13). He last worked in the 1980's because he could hardly breathe. (Tr. 13).

Claimant alleged nineteen years of coal mine employment, and this has not been contested. (DX 4). Accordingly, I credit the miner with nineteen years of coal mine employment. As his last employment was in the state of Kentucky, the law of the Sixth Circuit is controlling. *Shupe v. Director, OWCP*, 12 B.L.R. 1-200, 1-202 (1989) (en banc).

MEDICAL EVIDENCE

Section 718.101(b) requires any clinical test or examination to be in substantial compliance with the applicable standard in order to constitute evidence of the fact for which it is proffered. *See* §§ 718.102 - 718.107. The claimant and responsible operator are entitled to submit, in support of their affirmative cases, no more than two chest x-ray interpretations, the results of no more than two pulmonary function tests, the results of no more than two blood gas studies, no more than one report of each biopsy, and no more than two medical reports. §§ 725.414(a)(2)(i) and (3)(i). Any chest x-ray interpretations, pulmonary function studies, blood gas studies, biopsy report, and physician's opinions that appear in a medical report must each be admissible under § 725.414(a)(2)(i) and (3)(i) or § 725.414(a)(4). §§ 725.414(a)(2)(i) and (3)(i). Each party shall also be entitled to submit, in rebuttal of the case presented by the opposing party, no more than one physician's interpretation of each chest x-ray, pulmonary function test, arterial blood gas study, or biopsy submitted, as appropriate, under paragraphs (a)(2)(i), (a)(3)(i), or (a)(3)(iii). §§ 725.414(a)(2)(ii), (a)(3)(ii), and (a)(3)(iii). Notwithstanding the limitations of §§ 725.414(a)(2) or (a)(3), any record of a miner's hospitalization for a respiratory or pulmonary or related disease, or medical treatment for a respiratory or pulmonary or related disease, may be received into evidence. § 725.414(a)(4). The results of the complete pulmonary examination shall not be counted as evidence submitted by the miner under § 725.414. § 725.406(b).

Claimant selected Dr. Jeff Kaufman to provide his Department of Labor sponsored complete pulmonary examination. (DX 10). Dr. Kaufman conducted the examination on October 29, 2003. (DX 17). I admit Dr. Kaufman's report under § 725.406(b). I also admit Dr. Gaziano's quality-only interpretation of the October 15, 2003 chest x-ray under § 725.406(c). (DX 17).

Neither Claimant, Employer, nor Director completed a Black Lung Benefits Act Evidence Summary Form. However, a review of the evidence of record revealed the evidence that is summarized below. I find the evidence does not violate the evidentiary restrictions of § 725.414. Therefore, I admit the evidence summarized below.

X-RAYS

Exhibit	Date of X-ray	Date of Reading	Physician / Credentials	Interpretation
DX 17	10/15/03	10/15/03	Hood	No cardiopulmonary pathology
DX 17	10/15/03	10/27/03	Cox/BCR[5]	Negative
DX 17	10/15/03	01/28/04	Gaziano/B-reader[6]	Unreadable
DX 32	03/25/04	03/25/04	Hood	No acute cardiopulmonary pathology
DX 18	03/25/04	05/12/04	Gaziano/B-reader	Unreadable
DX 20	04/19/04	04/19/04	Rosenberg/B-reader	Negative
DX 20	04/19/04	04/19/04	Poulos/B-reader, BCR	Negative

PULMONARY FUNCTION TESTS

Exhibit/ Date	Co-op./ Undst./ Tracings	Age/ Height	FEV_1	FVC	MVV	FEV_1/ FVC	Qualifying Results
DX 17 10/15/03	Good/ Good/ Yes	65 73”	2.53	3.34	---	76%	No
DX 20 04/19/04	Good/ Good/ Yes	65 73”	2.74 2.98*	3.41 3.80*	56 38*	80% 78%	No No

*post-bronchodilator

ARTERIAL BLOOD GAS STUDIES

Exhibit	Date	pCO_{2*}	pO_{2*}	Qualifying
DX 17	10/15/03	42.4	68.2	No
DX 20	04/19/04	39.8	69.9	No

*after exercise

[5] A physician who has been certified in radiology or diagnostic roentgenology by the American Board of Radiology, Inc., or the American Osteopathic Association. *See* 20 C.F.R. § 727.206(b)(2)(III). The qualifications of physicians are a matter of public record at the National Institute of Occupational Safety and Health reviewing facility at Morgantown, West Virginia.

[6] A “B” reader is a physician who has demonstrated proficiency in assessing and classifying x-ray evidence of pneumoconiosis by successful completion of an examination conducted by or on behalf of the Department of Health and Human Services. This is a matter of public record at HHS National Institute for Occupational Safety and Health reviewing facility at Morgantown, West Virginia. (42 C.F.R. § 37.5l) Consequently, greater weight is given to a diagnosis by a "B" Reader. *See Blackburn v. Director, OWCP*, 2 B.L.R. 1-153 (1979).

Narrative Reports

Jeffrey K. Kaufman, D.O., examined the Claimant on October 29, 2003. (DX 17). Based on symptomatology (shortness of breath, orthopnea, ankle edema, and some productive cough), an employment history (nineteen to twenty years of underground coal mine employment, lastly as a truck driver), smoking history (one-half pack of cigarettes a day for twenty-five years before quitting in 1996), family history (heart disease and diabetes), individual medical history (diabetes, arthritis, stroke, depression, and more than one myocardial infarction), physical examination (scattered rhonchi), chest x-ray (negative), PFT (small airways dysfunction), and ABG (surprisingly good), Dr. Kaufman diagnosed dyspnea of uncertain etiology, arteriosclerotic heart disease, and non-insulin dependent diabetes mellitus. He "sincerely doubt[ed]" Claimant had coal workers' pneumoconiosis. Dr. Kaufman opined that the miner's dyspnea seemed more cardiac related based on all the evidence.

Dr. David M. Rosenberg, who is board certified in internal medicine and pulmonary disease, examined the miner on April 19, 2004. (DX 20). He considered symptomatology (breathing problems for the last fifteen to eighteen years and getting worse, walking only with assistance, on oxygen, shortness of breath with minimal activities, cough, sputum production, wheezing, and sleeping in an elevated hospital bed), individual medical history (asthma, stroke, myocardial infarctions, diabetes, and Alzheimer's disease), a family medical history (silicosis, gastrointestinal bleeding, and heart conditions), a coal mine employment history (eighteen years, last hauling coal), smoking history (one pack of cigarettes a day until 1998), physical examination (decreased air movement with rhonchi and wheezes but no rales), chest x-ray (negative), EKG (question of an old inferior wall myocardial infarction with a normal sinus rhythm), PFT (no significant obstruction or restriction with normal diffusing capacity), and ABG (normal). Dr. Rosenberg also reviewed reports from Drs. Fritzhand, Cooper, and Kaufman, the readings of Drs. Stelling and Cole of the June 22, 1983 x-ray, the readings of Drs. Rubenstein and Poulos of the October 28, 1987 x-ray, blood gas and pulmonary function studies from October 28, 1983, and the Holzer Clinic records.

Dr. Rosenberg found no evidence of pneumoconiosis or associated respiratory impairment. He stated that from a pulmonary perspective, the miner could perform his previous coal mining job or other similarly arduous types of labor. He opined that the miner was disabled but added that it was not related to or hastened by his coal mine dust inhalation. Rather, the causes were coronary artery disease, a previous stroke, Alzheimer's disease, and other multiple conditions.

Hospital and Treatment Records

The record contains treatment notes from the Holzer Clinic dated between May 29, 1996 and September 16, 2003. (DX 16, 22). As of January 1999, Claimant was still smoking one to two packs of cigarettes a day on a regular basis. Bypass surgery was recommended at that time. Physical examinations showed scattered expiratory wheezes. He was diagnosed with lower extremity weakness probably related to his past stroke, hypertension, arteriosclerotic heart disease, congestive heart failure, renal insufficiency, chronic obstructive lung disease, diabetes, and cerebrovascular disease with residual left hemiparesis.

Claimant was hospitalized from August 13, 2001 to August 16, 2001, with a diagnosis of chest pain. (DX 16). Dr. Gamani Thu attended the miner and made a discharge diagnosis of costochondritis and chronic obstructive pulmonary disease exacerbation.

David P. Evans, M.D., provided a letter dated October 16, 2001, in which he stated that he was treating Claimant for chronic obstructive lung disease and a history of coal workers' pneumoconiosis. (DX 16). Dr. Evans prescribed a nebulizer and oxygen.

Death Certificate

Claimant died on March 28, 2005, at the age of sixty-six. (DX 33). The death certificate, signed by Dr. David Evans, lists acute myocardial infarction and arteriosclerotic heart disease as the two causes of death. Dr. Evans also listed diabetes and chronic obstructive lung disease as other significant conditions that contributed to death, but did not result in the underlying cause of death.

Smoking History

Claimant testified at his deposition that he quit smoking in September 2003. (DX 22). Prior to that, he smoked for close to sixty years. He smoked about a pack of cigarettes a day from the age of seven. I find this to be consistent with the medical records. Therefore, I find that Claimant smoked about a pack of cigarettes a day for nearly sixty years.

DISCUSSION AND APPLICABLE LAW

This claim was made after March 31, 1980, the effective date of Part 718, and must therefore be adjudicated under those regulations. To establish entitlement to benefits under Part 718, Claimant must establish, by a preponderance of the evidence, that he:

1. Is a miner as defined in this section; and

2. Has met the requirements for entitlement to benefits by establishing that he:

   (i) Has pneumoconiosis (see § 718.202), and

   (ii) The pneumoconiosis arose out of coal mine employment (see § 718.203), and

   (iii) Is totally disabled (see § 718.204(c)), and

   (iv) The pneumoconiosis contributes to the total disability (see § 718.204(c)); and

3. Has filed a claim for benefits in accordance with the provisions of this part.

§ 725.202(d)(1-3); *see also* §§ 718.202, 718.203, and 718.204(c).

Subsequent Claim

The provisions of § 725.309 apply to new claims that are filed more than one year after a prior denial. Section 725.309 is intended to provide claimants relief from the ordinary principles of *res judicata*, based on the premise that pneumoconiosis is a progressive and irreversible disease. *See Lukman v. Director, OWCP*, 896 F.2d 1248 (10th Cir. 1990); *Orange v. Island Creek Coal Compamy*, 786 F.2d 724, 727 (6th Cir. 1986); § 718.201(c) (Dec. 20, 2000). The amended version of § 725.309 dispensed with the material change in conditions language and implemented a new threshold standard for the claimant to meet before the record may be reviewed *de novo*. Section 725.309(d) provides that:

> If a claimant files a claim under this part more than one year after the effective date of a final order denying a claim previously filed by the claimant under this part, the later claim shall be considered a subsequent claim for benefits. A subsequent claim shall be processed and adjudicated in accordance with the provisions of subparts E and F of this part, except that the claim shall be denied unless the claimant demonstrates that one of the applicable conditions of entitlement (see § 725.202(d) miner. . .) has changed since the date upon which the order denying the prior claim became final. The applicability of this paragraph may be waived by the operator or fund, as appropriate. The following additional rules shall apply to the adjudication of a subsequent claim:
>
> (1) Any evidence submitted in conjunction with any prior claim shall be made a part of the record in the subsequent claim, provided that it was not excluded in the adjudication of the prior claim.
>
> (2) For purposes of this section, the applicable conditions of entitlement shall be limited to those conditions upon which the prior denial was based. For example, if the claim was denied solely on the basis that the individual was not a miner, the subsequent claim must be denied unless the individual worked as a miner following the prior denial. Similarly, if the claim was denied because the miner did not meet one or more of the eligibility criteria contained in part 718 of the subchapter, the subsequent claim must be denied unless the miner meets at least one of the criteria that he or she did not meet previously.
>
> (3) If the applicable condition(s) of entitlement relate to the miner's physical condition, the subsequent claim may be approved only if new evidence establishes at least one applicable condition of entitlement. . . .
>
> (4) If the claimant demonstrates a change in one of the applicable conditions of entitlement, no findings made in connection with the prior claim, except those based on a party's failure to contest an issue, shall be binding on any party in the adjudication of the subsequent claim. However, any stipulation made by any party in connection with the prior claim shall be binding on that party in the adjudication of the subsequent claim.

Section 725.309(d) (April 1, 2002).

Claimant's most recent prior claim was denied after a Department of Labor claims examiner determined that Claimant failed to establish either the existence of pneumoconiosis or total disability. Therefore, in order for Claimant to avoid having his subsequent claim denied on the basis of the prior denial, he must establish one of these elements of entitlement.

Pneumoconiosis

In establishing entitlement to benefits, Claimant must initially prove the existence of pneumoconiosis under § 718.202. Claimant has the burden of proving the existence of pneumoconiosis, as well as every element of entitlement, by a preponderance of the evidence. *See Director, OWCP v. Greenwich Collieries*, 512 U.S. 267 (1994).

Pneumoconiosis is defined by the regulations:

> (a) For the purpose of the Act, "pneumoconiosis" means a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment. This definition includes both medical, or "clinical" pneumoconiosis and statutory, or "legal" pneumoconiosis.
>
> (1) *Clinical Pneumoconiosis*. "Clinical pneumoconiosis" consists of those diseases recognized by the medical community as pneumoconiosis, i.e., conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment. This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment.
>
> (2) *Legal Pneumoconiosis*. "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment.
>
> (b) For the purposes of this section, a disease "arising out of coal mine employment" includes any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment.
>
> (c) For purposes of this definition, "pneumoconiosis" is recognized as a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure.

Sections 718.201(a-c).

(1) Section 718.202(a) sets forth four methods for determining the existence of pneumoconiosis. Under § 718.202(a)(1), one method for finding that pneumoconiosis exists is the use of x-ray evidence.

In this claim the record contains six interpretations of three chest x-rays, and one quality-only interpretation. Dr. Gaziano read the March 25, 2004 x-ray as unreadable. Dr. Hood read it as showing no acute cardiopulmonary pathology. I consider this x-ray inconclusive for diagnosing pneumoconiosis.

Dr. Rosenberg and Dr. Poulos read the April 19, 2004 x-ray as negative. Both are B-readers, and Dr. Poulos is also board-certified in radiology. Based on their readings and credentials, I find this x-ray negative.

Dr. Hood read the October 15, 2003 x-ray as showing no cardiopulmonary pathology. Dr. Cox, a board-certified radiologist, found this film negative, and Dr. Gaziano, a B-reader, felt it was unreadable. Based on the uniform readings, I find this x-ray to be negative.

In summary, there are no positive readings. Consequently, I find that the x-ray evidence does not establish the existence of pneumoconiosis pursuant to § 718.202(a)(1).

(2) Under § 718.202(a)(2), a determination that pneumoconiosis is present may be based, in the case of a living miner, upon biopsy evidence. That method is not available in the instant case because this record contains no biopsy evidence.

(3) Section 718.202(a)(3) provides that pneumoconiosis may be established if any one of several cited presumptions are found to be applicable. In this case, the presumption of § 718.304 does not apply because there is no evidence in the record of complicated pneumoconiosis; Section 718.305 is not applicable to claims filed after January 1, 1982. Finally, the presumption of § 718.306 is applicable only in a survivor's claim filed prior to June 30, 1982. Therefore, Claimant cannot establish pneumoconiosis under subsection (a)(3).

(4) The fourth and final way in which it is possible to establish the existence of pneumoconiosis under § 718.202 is set forth in subsection (a)(4) which provides in pertinent part:

> A determination of the existence of pneumoconiosis may also be made if a physician, exercising sound medical judgment, notwithstanding a negative x-ray, finds that the miner suffers or suffered from pneumoconiosis as defined in § 718.201. Any such finding shall be based on electrocardiograms, pulmonary function studies, physical performance tests, physical examination, and medical and work histories. Such a finding shall be supported by a reasoned medical opinion.

This section requires a weighing of all relevant medical evidence to ascertain whether or not Claimant has established the presence of pneumoconiosis by a preponderance of the evidence. Any finding of pneumoconiosis under § 718.202(a)(4) must be based upon objective medical

evidence and also be supported by a reasoned medical opinion. A reasoned opinion is one which contains underlying documentation adequate to support the physician's conclusions. *Fields v. Island Creek Coal Co.*, 10 B.L.R. 1-19, 1-22 (1987). Proper documentation exists where the physician sets forth the clinical findings, observations, facts, and other data on which he bases his diagnosis. *Oggero v. Director, OWCP*, 7 B.L.R. 1-860 (1985).

Dr. Kaufman did not believe the miner had either clinical or legal pneumoconiosis. His opinion is well documented and well reasoned. *Perry v. Director, OWCP*, 9 BLR 1-1 (1986). Dr. Kaufman relied upon objective testing, such as the readings of the x-ray he considered, the miner's clinical examination, and the results of his pulmonary function and blood gas studies. Dr. Kaufman clearly articulates how Claimant's dyspnea can be more readily attributed to his cardiac condition rather than to coal dust exposure. As Dr. Kaufman relied upon objective evidence and clearly articulates his opinion, I place probative weight on his opinion.

The opinion of Dr. Rosenberg, who also did not find the existence of either clinical or legal pneumoconiosis, is also well documented and reasoned. His negative x-ray reading was confirmed negative by Dr. Poulos, a board-certified radiologist. In addition, his opinion merits greater weight because of his superior qualifications in the field of pulmonary disease. *Scott v. Mason Coal Co.*, 14 BLR 1-38 (1990). Dr. Rosenberg also had the opportunity to review other medical evidence of record, thus providing him with a broader base of data from which to draw his conclusions. He had the best picture of the miner's health over time. He considered his personal examination as well as objective evidence in drawing his conclusions. Accordingly, as Dr. Rosenberg relied upon objective evidence and had a clear picture of Claimant's medical records, I place great weight on his opinion.

A review of the hospital and treatment records shows a finding of chronic obstructive pulmonary disease and a "history of coal workers' pneumoconiosis." The COPD was not related to coal mine employment or dust exposure. Therefore, it cannot be considered a diagnosis of legal pneumoconiosis. Furthermore, the notation of a history of pneumoconiosis is not actually a diagnosis of the same. These records did not evince familiarity with the claimant's employment history or dust exposure, and the x-rays that are part of these records were not read as showing any opacities consistent with pneumoconiosis. For these reasons, I do not find that any of the physicians who treated the miner at the Holzer Clinic or during his hospital stays made a diagnosis of pneumoconiosis. In short, these records do not support a finding of either clinical or legal pneumoconiosis. Similarly, the death certificate, although listing COPD as a condition that contributed to death but did not result in the underlying cause of death, did not associate the COPD with coal dust exposure. Therefore, I do not consider it as supportive of a finding of legal pneumoconiosis.

A letter submitted by Dr. Evans on October 16, 2001 stated that he treated Claimant for COPD and a "history of coal workers' pneumoconiosis." (DX 16). The records which accompany this letter in fact diagnose COPD, but do not attribute the cause to coal dust exposure. As such, I do not consider this a diagnosis of legal pneumoconiosis, and place no weight on the letter.

After considering the conflicting conclusions, I find, for the reasons set forth above, that Drs. Rosenberg and Kaufman's opinions are the most persuasive. Therefore, I find that the evidence does not establish the existence of pneumoconiosis under § 718.202(a)(4).

Upon consideration of all the evidence under § 718.202(a), I find the medical opinion evidence and the x-ray evidence equally persuasive. The x-ray evidence supports the opinions of Drs. Rosenberg and Kaufman. Consequently, I find that Claimant has failed to establish the existence of pneumoconiosis by a preponderance of the evidence pursuant to § 718.202(a). *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211 (4th Cir. 2000).

Arising out of Coal Mine Employment

In order to be eligible for benefits under the Act, Claimant must prove that pneumoconiosis arose, at least in part, out of his coal mine employment. § 718.203(a). As I have found that Claimant has established nineteen years of coal mine employment, he would be entitled to the rebuttable presumption set forth in § 718.203(b) – that his pneumoconiosis arose out of coal mine employment – if he had first established the existence of pneumoconiosis. Because he has not, this issue is moot.

Total Disability

Claimant may demonstrate that he is totally disabled from performing his usual coal mine work or comparable work due to pneumoconiosis under one of the five standards of § 718.204(b) or the irrebuttable presumption referred to in § 718.204(b). The Board has held that under § 718.204(b), all relevant probative evidence, both like and unlike must be weighed together, regardless of the category or type, in the determination of whether the Claimant is totally disabled. *Shedlock v. Bethlehem Mines Corp.*, 9 B.L.R. 1-195 (1986); *Rafferty v. Jones & Laughlin Steel Corp.*, 9 B.L.R. 1-231 (1987). Claimant must establish this element of entitlement by a preponderance of the evidence. *Gee v. W.G. Moore & Sons*, 9 B.L.R. 1-4 (1986).

There is no evidence that Claimant has established that he suffers from complicated pneumoconiosis. Therefore, the irrebuttable presumption of § 718.304 does not apply.

Total disability can be shown under § 718.204(b)(2)(i) if the results of pulmonary function studies are equal to or below the values listed in the regulatory tables found at Appendix B to Part 718. There are two PFTs submitted in conjunction with this claim. Neither produced qualifying values. Therefore, I find that Claimant has failed to establish total disability pursuant to § 718.204(b)(2)(i).

Total disability can be demonstrated under § 718.204(b)(2)(ii) if the results of arterial blood gas studies meet the requirements listed in the tables found at Appendix C to Part 718. There are two ABGs submitted in this claim. Neither yielded qualifying results. Accordingly, I find that Claimant has failed to establish the existence of total disability under subsection (b)(2)(ii).

Total disability may also be shown under § 718.204(b)(2)(iii) if the medical evidence indicates that Claimant suffers from cor pulmonale with right-sided congestive heart failure. The record does not contain any evidence indicating that Claimant suffers from cor pulmonale with right-sided congestive heart failure. Therefore, I find that Claimant has failed to establish the existence of total disability under subsection (b)(2)(iii).

Section 718.204(b)(2)(iv) provides for a finding of total disability if a physician, exercising reasoned medical judgment based on medically acceptable clinical or laboratory diagnostic techniques, concludes that a miner's respiratory or pulmonary condition prevented the miner from engaging in his usual coal mine employment or comparable gainful employment. Claimant's usual coal mine employment required him to drive a coal truck.

The exertional requirements of the Claimant's usual coal mine employment must be compared with a physician's assessment of the Claimant's respiratory impairment. *Cornett v. Benham Coal, Inc.*, 227 F.3d 569 (6th Cir. 2000). Once it is demonstrated that the miner is unable to perform his usual coal mine work, a *prima facie* finding of total disability is made and the party opposing entitlement bears the burden of going forth with evidence to demonstrate that the miner is able to perform "comparable and gainful work" pursuant to § 718.204(b)(1). *Taylor v. Evans & Gambrel Co.*, 12 B.L.R. 1-83 (1988).

Nonrespiratory and nonpulmonary impairments have no bearing on establishing total disability due to pneumoconiosis. § 718.204(a); *Jewell Smokeless Coal Corp. v. Street*, 42 F.3d 241 (1994). All evidence relevant to the question of total disability due to pneumoconiosis is to be weighed, with the Claimant bearing the burden of establishing by a preponderance of the evidence the existence of this element. *Mazgaj v. Valley Camp Coal Co.*, 9 B.L.R. 1-201 (1986).

Dr. Kaufman did not provide an opinion on the issue of disability. The hospital and treatment records and death certificate do not address the matter of disability either. Dr. Rosenberg opined that from a pulmonary perspective, the miner could perform his previous coal mining job or other similarly arduous types of labor. While also finding that Claimant was disabled, he listed the causes as coronary artery disease, a stroke, and Alzheimer's disease, but added that it was in no way related to coal mine dust inhalation. I find that Dr. Rosenberg's opinion is supported by the non-qualifying PFT's and ABG's. Moreover, the hospital and treatment records reveal that the miner was primarily treated for his stroke and a heart condition. For these reasons, and because Dr. Rosenberg also based his opinion upon a review of additional medical evidence and is a specialist is pulmonary medicine, I place great weight on his opinion. Accordingly, I find that Claimant has not established that he was totally disabled pursuant to § 718.204(b)(2)(iv).

Entitlement

Claimant has failed to establish either the existence of pneumoconiosis or total disability. As a result, he has also failed to demonstrate that any applicable condition of entitlement has changed since the date of the last denial pursuant to § 725.309(d). Therefore, I find that Claimant is not entitled to benefits under the Act.

Attorney's Fees

An award of attorney's fees is permitted only in cases in which the claimant is found to be entitled to benefits under the Act. Because benefits are not awarded in this case, the Act prohibits the charging of any fee to the claimant for the representation and services rendered in pursuit of the claim.

ORDER

IT IS ORDERED that the claim of V.S. for benefits under the Act is hereby DENIED.

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THOMAS F. PHALEN, JR.
Administrative Law Judge

NOTICE OF APPEAL RIGHTS

NOTICE OF APPEAL RIGHTS: If you are dissatisfied with the administrative law judge's decision, you may file an appeal with the Benefits Review Board ("Board"). To be timely, your appeal must be filed with the Board within thirty (30) days from the date on which the administrative law judge's decision is filed with the district director's office. *See* 20 C.F.R. §§ 725.458 and 725.459. The address of the Board is: Benefits Review Board, U.S. Department of Labor, P.O. Box 37601, Washington, DC 20013-7601. Your appeal is considered filed on the date it is received in the Office of the Clerk of the Board, unless the appeal is sent by mail and the Board determines that the U.S. Postal Service postmark, or other reliable evidence establishing the mailing date, may be used. *See* 20 C.F.R. § 802.207. Once an appeal is filed, all inquiries and correspondence should be directed to the Board.

After receipt of an appeal, the Board will issue a notice to all parties acknowledging receipt of the appeal and advising them as to any further action needed.

At the time you file an appeal with the Board, you must also send a copy of the appeal letter to Allen Feldman, Associate Solicitor, Black Lung and Longshore Legal Services, U.S. Department of Labor, 200 Constitution Ave., NW, Room N-2117, Washington, DC 20210. *See* 20 C.F.R. § 725.481.

If an appeal is not timely filed with the Board, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 20 C.F.R. § 725.479(a).